No. 87-1241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

UNION GAS COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, ILLINOIS, INDIANA, IOWA, KENTUCKY, MARYLAND, MISSOURI, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, SOUTH CAROLINA, UTAH, VERMONT, and WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a provision in the Superfund Act, as amended, referring to state liability without mention of waiver of the eleventh amendment, constitutes the requisite unmistakable expression of Congressional intent necessary to nullify eleventh amendment protections.

2. Whether Congress possesses the power to abrogate the eleventh amendment, without consent of the States, actual or implied, pursuant to article I of the Constitution.

3. Whether a valid Congressional abrogation of the eleventh amendment may be applied retroactively to completed state actions.

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INTEREST OF *AMICI CURIAE*

The *amici curiae* States of New York, California, Connecticut, Illinois, Indiana, Iowa, Kentucky, Maryland, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Utah, Vermont, and West Virginia, submit this brief in support of the Commonwealth of Pennsylvania's petition for review on writ of certiorari of the decision rendered by the United States Court of Appeals for the Third Circuit in *United States v. Union*

Gas Company, 832 F.2d 1343 (3d Cir. 1987) (slip opinion contained in Petitioner's Appendix). The court of appeals held that Congress, in enacting the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (1982) ("CERCLA" or "Superfund Act"), as amended by the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499, 100 Stat. 1613 (1987)("SARA"), authorized private Superfund suits against the states in federal court and, as such, expressed its intention to abrogate the eleventh amendment to the United States Constitution. Furthermore, the court of appeals found that Congress had the power to so abrogate, without any consent on the part of the states, pursuant to article I of the Constitution. Finally, the court held such abrogation to apply retroactively to state activities undertaken before its enactment.

The eleventh amendment was designed to preserve the important principle of federalism and to protect states from unwarranted intrusions by the federal courts into state treasuries. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984) (*Pennhurst II*) (relying on *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). The vitality of this constitutional protection has been frequently and consistently reaffirmed by this Court, most recently in *Welch v. Texas Department of Highways and Public Transportation*, 107 S. Ct. 2941, 2949-53 (1987). Despite such precedent, the court below has attempted to restrict severely the protection afforded by the eleventh amendment, not only in the context of the Superfund Act but, potentially, in all areas of state activity where federal regulation exists. By virtually eliminating any limits on Congress' power to abrogate eleventh amendment immunity, both prospectively and retrospectively, the court of appeals has rendered the provision almost completely ineffectual. The *amici* states have a substantial interest in having this Court review the decision of the court below now, before the consequences of such decision become irreversible.

With respect to federal Superfund legislation, the states, without eleventh amendment protection under CERCLA, will be subjected to protracted litigation in federal court which may

have a harsh impact on the states' treasuries and provide a disincentive for states to protect the public health and welfare. Hazardous waste sites exist in all the *amici* states as evidenced by the National Priority List developed pursuant to CERCLA. *See* 40 C.F.R. Part 300, Appendix B (1987). The states are heavily involved in the cleanup of these sites. Actions taken in the past as well as those currently being undertaken by the *amici* states in providing services essential to the public welfare,[1] pursuant to valid police powers,[2] or even in response to the presence of toxic substances,[3] has resulted in and certainly will lead to increased litigation commenced by private parties against the states in federal court under CERCLA.[4] Future actions required of the states will be discouraged to the detriment of the public.

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[1] Consider, for example, the Commonwealth of Pennsylvania's activities which were at issue before the court below. Pennsylvania undertook to dredge and fill the Brodhead Creek in order to alleviate flooding which had occurred in the area. Certainly, these operations were essential to the public welfare.

[2] In New York, for example, in response to information concerning the unlawful disposal of hazardous substances, the New York State Police, pursuant to a valid warrant, entered the property in question, discovered the hazardous materials, and roped off the area as a "crime scene." The State Police were subsequently sued in a third-party action for contribution to cleanup costs as an "operator" of the site under CERCLA. The case is currently before Judge Elfvin in the Western District of New York for consideration of the state's motion to dismiss on eleventh amendment grounds. *United States v. Freeman*, Civil Action No. 86-748-E (W.D.N.Y.). The State of South Carolina has been sued in a similar third-party action for exerting control over a hazardous waste site by making several regulatory decisions, in the course of its normal governmental functions, which allegedly affected the site. South Carolina prevailed on a motion to dismiss on eleventh amendment grounds before the district court. The decision is currently on appeal. *United States v. Dart Industries, Inc.*, No. 87-3130 (4th Cir.).

[3] For example, states have encountered situations in which private parties have asserted that the states are "owners or operators" under CERCLA because they have exerted control over property when conducting in-depth investigations of the contamination present on the site or by performing other cleanup activities. California is one such example. *E.g., United States v. J.B. Stringfellow*, Civil Action No. 83-2501-JMI (C.D. Cal.).

[4] The litigation often takes the form of a third-party action for contribution to cleanup costs alleging that these state actions have contributed in some way

(Footnote continued)

It is likely that burdens, similar to those discussed above under the Superfund Act, will be borne by the states in other areas of federal regulation should the court of appeals' sweeping pronouncements be applied to those areas. It is, of course, as discussed in this brief, the position of the *amici* states that the court below erred in its construction of CERCLA and ignored critical constitutional issues when evaluating the role played by the eleventh amendment. Whatever the ultimate opinion of this Court with respect to this decision, review of the decision by this Court at this time will provide the necessary guidance to Congress and the states concerning the current vitality of the eleventh amendment. Therefore, the seventeen *amici* states respectfully urge this Court to grant the petition for a writ of certiorari in this matter.

STATEMENT OF THE CASE

Amici rely on the Statement as set forth in the Petition of the Commonwealth of Pennsylvania.

ARGUMENT

The decision of the Court of Appeals for the Third Circuit will have a nationwide effect by substantially broadening the scope of state liability under the Superfund Act and expanding the power of Congress to negate the protections afforded to the states under the eleventh amendment. With the disposition of this case, the court below has disregarded a large body of law already developed by this Court concerning the importance of the eleventh amendment within our federal system and the limitations on Congress' authority to affect that system. This disregard of precedent and the wide impact it will have justify this Court's review of the matter at this time.

1. *The court of appeals erred in its holding that CERCLA as amended by SARA evinced Congressional intent to override*

to the hazardous waste problem. This type of litigation for monetary damages against the states is exactly the type which is barred by the eleventh amendment. The Framers determined long ago that such matters of liability are more appropriately handled by the state courts. *Pennhurst II*, 465 U.S. at 99.

the eleventh amendment. In determining whether a Congressional act serves to nullify eleventh amendment immunity, irrespective of the authority under which Congress purports to act, this Court has consistently considered the threshold question whether Congress in its enactment has clearly expressed its intent. This Court has demonstrated a great "reluctance to infer that a State's immunity from suit in the federal courts has been negated . . . [in] recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst II*, 465 U.S. at 99. "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued but *where* it may be sued." *Id.* (emphasis in original, footnote omitted). For this reason, this Court has established the very specific ground rule that there must be "an unequivocal expression of Congressional intent" before the effect of the eleventh amendment may be neutralized. *Id.*

This Court forcefully enunciated this "clear language" rule in *Employees of the Dept. of Public Health and Welfare v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 285 (1973).[5] Since then, the requirement has been reaffirmed and strengthened several times. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (citing *Pennhurst II*, 465 U.S. at 99); *Quern v. Jordan*, 440 U.S. 332, 342 (1979).[6] Just last term,

[5] In *Employees*, this Court considered whether employees of Missouri health facilities could sue the state in federal court for overtime pay under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1972). The Act applied to "employers" which was defined to include state hospitals. This Court found the definition of "employers" insufficient to demonstrate Congressional intent to deny states of their eleventh amendment immunity. 411 U.S. at 285.

[6] This Court in *Atascadero* reviewed language in Section § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), which provided that remedies for violations of the Act "shall be available to any person aggrieved by any act or failure to act by *any recipient* of Federal assistance" under the Act. 473 U.S. at 245 (emphasis added). States were eligible recipients of such federal assistance, however, the language of the statute was held to be inadequate for purposes of the "clear language" standard. Similarly, in *Quern v. Jordan*, eleventh amendment immunity was determined to be unaltered by the language in 42 U.S.C. § 1983 (1978). 440 U.S. at 342.

Justice Powell observed that this Court "consistently has required an unequivocal expression that Congress intended to override Eleventh Amendment immunity." *Welch*, 107 S. Ct. at 2948. The Court in *Welch* went on to conclude that the statute at issue lacked the requisite "unmistakably clear language." *Id.*[7] "Because of the role of the States in our federal system, ['a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.[']" *Id.* at 2947 (quoting *Atascadero*, 473 U.S. at 246).

In each of the cases in which this Court has found the statute failed to satisfy the "clear language" rule, *see, e.g., Welch*, 107 S. Ct. at 2947; *Atascadero*, 473 U.S. at 245; *Quern v. Jordan*, 440 U.S. at 342; and *Employees*, 411 U.S. at 285, Congress failed to state specifically that it was eliminating eleventh amendment protections. In fact, there was no mention of the eleventh amendment in these statutes. Without such clear notice, this Court has demonstrated an emphatic unwillingness to infer that states should be deprived of this constitutional defense. It is with this backdrop of precedent that the court of appeals most remarkably concluded that an amendment to the definitional section of CERCLA, without mention of the eleventh amendment in its language, clearly expressed Congress' intent to abrogate the eleventh amendment.

The first decision by the court below in *United States v. Union Gas*, 792 F.2d 372 (3d Cir. 1986)(slip opinion contained in Petitioner's Appendix) correctly relied on this Court's opinion in *Employees*, 411 U.S. at 285, in determining that the eleventh amendment barred the action under CERCLA. 792 F.2d at 379-80. Specifically addressed was the question whether the inclusion of states in the definition of "person" under CERCLA constitutes a waiver of a state's eleventh amendment immunity.

[7] The provision considered and rejected in *Welch* was § 33 of the Jones Act, 46 U.S.C. § 688 (1975), which provided that "any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law. . ." and that in such action jurisdiction lies in the federal district courts. 107 S. Ct. at 2947.

42 U.S.C. § 9601(21) (1982).[8] The court of appeals found that the liability provision of CERCLA, 42 U.S.C. § 9607 (1982),[9] did not allow for private suits against states in federal court simply because of the definition of "person," but did empower the United States to sue the states under the statute.[10]

The proposition that private suits against a state are not authorized by CERCLA is not altered by the SARA amendments to the Superfund Act. Specifically, the definitional section of CERCLA, 42 U.S.C. § 9601(20) (1982), was amended by SARA to include the following new subparagraph:

> (D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

CERCLA, 42 U.S.C.A. § 9601(20) (West Supp. 1987).

[8] "Person" as defined in CERCLA includes "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, Municipality, commission, political subdivision of a state, or any interstate body." 42 U.S.C. § 9601(21) (1982).

[9] The liability provision of CERCLA, 42 U.S.C. § 9607(a) (1982), provides, *inter alia*, that any person who disposes of hazardous substances or who owns or operates, at the time of disposal, a facility at which hazardous substances were disposed of, shall be liable for the costs of removing the hazardous substances.

[10] Suits by the United States against states are not foreclosed by the eleventh amendment. *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

The specific purpose of the amendment was to exclude from the definition of "owner or operator" any state or local government which acquired title or possession involuntarily or by virtue of its function as sovereign. "These are not cases where the law intended that governments bear the liability burdens of Superfund. . . ." 131 Cong. Rec. S11619 (daily ed. September 17, 1985) (comments of Senator Stafford). *See also* the Conference Report accompanying SARA, H.R. Rep. No. 962, 99th Cong., 2d Sess. 185 (1986). Only if the government has "caused or contributed" to the release or threatened release of a hazardous substance when it acquired ownership or possession in these instances does the liability provision of section 9607 apply. As the court of appeals stated before the passage of the SARA amendments, however, a state may be held liable in federal court for damages under CERCLA to the United States only. *Union Gas*, 792 F.2d at 380. The new language of SARA contained in the definition of owner or operator merely redefines the extent of that liability to the United States to protect "innocent" states.

If Congress had intended to repudiate the eleventh amendment under CERCLA, as discussed above, Congress would have had to do so using "unequivocal" language. Congress certainly would not have chosen to hold states liable only in their capacity as owners or operators of hazardous waste sites who cause or contribute to the release of hazardous substances and to allow those states which simply dispose of hazardous substances at sites owned by others to remain protected by the eleventh amendment. The new language of section 9601(20)(D) found in the definition of "owner or operator," however, suggests that such a bizarre interpretation of Congressional intent is possible.[11] This demonstrates that the language is hardly unequivocal and much too vague to establish across-the-board eleventh amendment abrogation. The only interpretation of the language which

[11] It is a canon of statutory construction that absurd consequences be avoided. *United States* v. *Bryan*, 339 U.S. 323, 338 (1950); *United States* v. *Kirby*, 74 U.S. 482, 486 (1869).

makes sense is that it applies to state liability to the federal government.

Neither the original language of CERCLA nor the new language of SARA expresses Congress' intention to abrogate the eleventh amendment. As was the case in *Welch*, *Atascadero*, *Quern*, and *Employees*, there is no mention or discussion of waiver or nullification of eleventh amendment immunity either in the statutes themselves or in any relevant legislative history. In light of all of the important governmental functions which states perform, it cannot be inferred that Congress meant to deprive the states of their guaranteed immunity without "indicating in some way by clear language that the constitutional immunity was swept away." *Employees*, 411 U.S. at 285.

2. *The court of appeals erred in its conclusion that Congress may unilaterally abrogate eleventh amendment immunity when acting pursuant to its powers under article I.* "[']That a State may not be sued without its consent is a fundamental rule of jurisprudence. . . .[']" *Pennhurst II*, 465 U.S. at 98 (quoting *Ex Parte State of New York No. 1*, 256 U.S. 490, 497 (1921)). An exception to this fundamental rule was established by this Court in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). Congress, when acting pursuant to section 5 of the fourteenth amendment, may abrogate the eleventh amendment without the states' consent.[12] This is in recognition of the unique character of the fourteenth amendment.

The fourteenth amendment clearly contemplates limitations on a state's power. *Id.* at 453-456. By its terms, section 1 grants individuals certain protections as against the states. Section 5

[12] The only other limited exceptions established by this Court are not relevant here. *See Ex Parte Young*, 209 U.S. 123 (1908) (holding eleventh amendment does not prevent federal courts from granting prospective relief against state officials to stop violation of federal law); *United States* v. *United States Fidelity and Guaranty Corp.*, 309 U.S. 506 (1940) (recognizing a partial implied waiver of eleventh amendment immunity with respect to certain counterclaims when a state initiates an action in federal court).

specifically empowers Congress such that "[it] may, in determining what is [']appropriate legislation[']for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Id.* at 456. Thus, the eleventh amendment is "necessarily limited by § 5 of the Fourteenth Amendment." *Id.* at 456.[9] This principle was reaffirmed in *Atascadero*, 473 U.S. at 238, and again most recently in *Welch*, 107 S. Ct. at 2946.

CERCLA and the SARA amendments were not enacted by Congress pursuant to the fourteenth amendment. Therefore, the issue before the court below was whether Congress possessed the authority to abrogate the eleventh amendment without consent of the states when legislating pursuant to its other powers; in this case, the commerce clause, U.S. Const., art. I. § 8, cl. 3. The court of appeals, citing *Welch*, 107 S. Ct. at 2946, and *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 252 (1985), found that the Supreme Court had not spoken on this question and therefore reviewed it as a case of first impression. The court then erroneously concluded that any plenary power under the Constitution provides the ability for Congress to abrogate unilaterally the constitutional protections guaranteed to the states without their consent.

Although this Court may not have reached the precise question in *Welch* and *County of Oneida*, the court of appeals erred in its analysis by ignoring significant precedent established in other decisions of this Court. As demonstrated below, in each case which considered limitations on the eleventh amendment

[9] The fourteenth amendment was ratified with awareness of the eleventh amendment and is recognized as a limitation on that amendment. *Fitzpatrick*, 427 U.S. at 456. So too, by their terms, are the thirteenth (abolishing slavery), fifteenth (concerning right to vote), nineteenth (concerning women's suffrage) and twenty-fourth (prohibiting poll taxes) which all 1) grant individuals protection against the states and 2) grant authority to Congress to enact legislation to enforce the respective constitutional protections. This Court, however, has not yet addressed these amendments in the context of the eleventh amendment.

created by the operation of statutes outside the sphere of the fourteenth amendment, this Court has required the element of state consent. Specifically, this Court has indicated that limitations on eleventh amendment immunity may be found in these cases only if Congress has acted in these statutes to induce states to waive their immunity by their participation in certain activities regulated under the statutes. The participation by the states in these activities might then be interpreted as constituting an implied waiver of the eleventh amendment if the participation is voluntary with full knowledge of the consequences. *See Edelman v. Jordan*, 415 U.S. at 672.

The theory of implied waiver was first announced by this Court in *Parden v. Terminal R.R. Co.*, 377 U.S. 184 (1964), which concerned a statute enacted pursuant to the commerce clause.[10] Of course, a state does not impliedly waive its immunity simply by operating in a federally regulated sphere. Congress must first express itself in "clear language" if it wishes to condition a state's participation in an activity subject to federal regulation "on the forfeiture of immunity from suit in a federal forum." *Employees*, 411 U.S. at 285. Only after such clear expression by Congress may it then be determined whether the extent of the state's participation in that activity constitutes an implied waiver of the eleventh amendment.[11]

[10] This Court recently in *Welch*, 107 S. Ct. at 2948, overruled *Parden* to the extent that it was "inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language. . . ." *Parden* continues to stand for the proposition that, under certain circumstances, Congress may condition state activities upon waiver of eleventh amendment protections, even though *Welch* considered the specific statute in *Parden* insufficient with respect to the "clear language" standard. *Id.*

[11] The state activity at issue in *Parden* was operation of a railroad for profit, an activity outside the scope of normal governmental function. 377 U.S. at 195. In contrast, the activity in *Employees* was the operation of state hospitals. 411 U.S. at 284. In light of this Court's reluctance to find forfeiture of eleventh amendment immunity, a state's involvement in providing an essential service

(Footnote continued)

The power of Congress to touch the constitutional protections of the eleventh amendment under the spending clause, U.S. Const., art. I, § 8, cl. 1, has also been considered by this Court. Again, waiver by the states was regarded as a critical element in determining whether eleventh amendment protections remained available to the states under statutes enacted pursuant to the spending clause. "The legitimacy of Congress' power to [abrogate the eleventh amendment] ... under the spending power . . . rests on whether the State voluntarily and knowingly accepts [those] . . . terms. . . ." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst I*). The "analysis relevant to Spending Clause enactments," assuming the "clear language" test is met, therefore focuses on whether a state by its participation in a program authorized by Congress has in effect consented to the abrogation of eleventh amendment immunity. *Atascadero*, 473 U.S. at 246-7, n. 5.

While admitting that this Court has drawn a distinction between article I and the fourteenth amendment in evaluating Congress' power to abrogate the eleventh amendment, the court of appeals incorrectly describes the distinction as being the level of clarity required in the language of a statute to demonstrate the abrogation. It seems to suggest that statutes enacted under the fourteenth amendment do not require the same unequivocal language as must be evident in statutes enacted pursuant to article I. The distinction posited by the court below does not exist. This Court has consistently stated that, even under the fourteenth amendment, an unequivocal expression of congressional intent is required. *Welch*, 107 S. Ct. at 2946; *Pennhurst II*, 465 U.S. at 99. Instead, the distinction between abrogation under article I and the fourteenth amendment is based upon the requirement under article I for some cognizant waiver of eleventh amendment immunity by a state's action. The court of appeals

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for the public welfare should never be construed as providing the requisite consent to waiver of the eleventh amendment. Certainly, the activities which are outlined *supra* at ns. 1, 2 and 3 are not activities which should trigger waiver of eleventh amendment protections.

attempts to wipe out this requirement and by doing so renders the eleventh amendment virtually meaningless.

The Court of Appeals for the Ninth Circuit, in its recent decision in *Collins v. Alaska*, 823 F.2d 329, 332 (9th Cir. 1987), recognized Congress' power to abrogate the eleventh amendment, without consent of the states, when acting pursuant to the fourteenth amendment. The court also acknowledged Congress' power to abrogate with respect to other enumerated powers. This second type of abrogation, however, was found to require waiver of state immunity, whether actual or implied. The *Collins* case was decided ultimately on the question of compliance with the "clear language" rule, which the court of appeals held had not been demonstrated. Although the Ninth Circuit decision is not in direct conflict with the decision challenged here, it demonstrates the urgency for this Court to review the instant matter in order to dispel the confusion that exists.

3. *The court of appeals erred in finding that the purported Congressional abrogation of eleventh amendment immunity in CERCLA could be applied retroactively.* Possibly the most onerous of the court of appeals' findings is the one applying the adjudged abrogation retroactively to completed state activities. As discussed above, the concepts of state consent and waiver are fundamental in eleventh amendment analysis. *Edelman*, 415 U.S. at 672; *Employees*, 411 U.S. at 285. "By insisting that Congress speak with a clear voice" when conditioning state activity upon waiver of its eleventh amendment immunity, this Court has "enable[d] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst I*, 451 U.S. at 17. "There can, of course, be no knowing acceptance if a state is unaware" of the abrogation. *Id.*

The court below found that the 1986 SARA amendments provided the language in CERCLA to abrogate the eleventh amendment. The relevant activities of the Commonwealth of Pennsylvania were completed several years before enactment of the amendments. No action on the part of the Commonwealth could

constitute implied consent or a knowing waiver of its eleventh amendment immunity.[16] To allow such a waiver to be implied retroactively, or to apply a sweeping abrogation retroactively without regard for consent either actual or implied, would completely destroy the constitutional protections this Court has so carefully preserved.

States are provided by the eleventh amendment with the opportunity, free of interference from the federal judiciary, to establish their own laws and judicial forums to decide issues of private damages which will affect their treasuries and in turn their citizens. In view of the important functions performed by the states for the benefit of their citizens, public policy dictates that this protection from federal intrusion should not be stripped away silently without the knowledge and consent of the states.

[16] As shown in n. 14, *supra*, "[t]o suggest that the State had the choice of either ceasing operation of these vital public services or ['consenting'] to federal suit suffices. . . to demonstrate that the State had no true choice at all. . . ." *Employees*, 411 U.S. at 296 (Marshall, J., concurring).

CONCLUSION

The *amici curiae* states span the continent. They are large and small, urban and rural. Together they present the concern that a refusal by this Court to review the *Union Gas* decision would result in the diminution of the states' eleventh amendment protections and would severely restrict not only the Commonwealth of Pennsylvania but *all* states in essential governmental activities. For this reason and on the basis of all the arguments set forth above, this Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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